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May 22, 1998

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BY HAND

Ms. Magalie Roman Salas

Secretary

Federal Communications Commission

1919 M Street, NW, Room 222

Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: ***Opposition***

In the Matter of Advanced Television Systems and
Their Impact Upon the Existing Television Broadcast Service
Petition for Rulemaking for "Class A" Television Service
RM-9260

Dear Ms. Roman Salas:

Transmitted herewith, on behalf of the Association for Maximum Service Television, Inc. ("MSTV"), are an original and nine copies of the Opposition of MSTV to the above-referenced Petition for Rulemaking of the Community Broadcasters Association.

Please direct any questions to the undersigned.

Respectfully submitted,

Mary Newcomer Williams

Mary Newcomer Williams*
Attorney for MSTV

Enclosures

*Member of the Bar of Pennsylvania
Not admitted to the Bar of the District of Columbia

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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Service)

TO: The Commission

**OPPOSITION OF THE
ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

May 22, 1998

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SUMMARY

The Association for Maximum Service Television ("MSTV") submits this Opposition to the Petition for Rulemaking filed by the Community Broadcasters Association ("CBA") (the "CBA Petition") to urge the Commission to stand by the commitment that it has made repeatedly throughout the DTV proceeding to maintain the secondary status of LPTVs and translators.

Granting primary status to LPTVs and translators at this time would seriously threaten the accomplishment of the swift and effective DTV transition contemplated by Congress and the Commission. For example, under the rule proposed by CBA, "Class A" low power licensees would have priority over certain not-yet-"authorized" DTV stations and could prevent those stations from ever lighting up, and full power DTV licensees compelled to "race" for priority or to preserve their DTV allotments against Class A applicants would lose the freedom to negotiate with other DTV broadcasters for a joint tower or to switch allotments.

Such disruption simply is not warranted. The Commission has maintained a long-standing public interest commitment to wide-area service and the primacy of full power service over secondary low power services, and has repeatedly reaffirmed that commitment in the DTV proceeding. Nonetheless, the Commission expressly recognized the value of low power services and took special steps to accommodate them in the DTV transition. Nothing in the CBA Petition justifies the further step of fundamentally altering the relationship between primary full power services and secondary low power services.

Before the
Federal Communications Commission
Washington, D.C. 20554

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and Their Impact Upon the)	RM-9260
Existing Television Broadcast)	
Service)	

TO: The Commission

**OPPOSITION OF THE
ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

The Association for Maximum Service Television, Inc. ("MSTV") files these comments in opposition to the Petition for Rulemaking filed by the Community Broadcasters Association ("CBA") seeking creation of a new "Class A" television station class (the "CBA Petition") under which "qualified low power television ('LPTV') stations providing substantial local programming service" would be granted "primary spectrum user status against all but full power television stations authorized as of the date of this petition."^{1/} The Commission should deny the CBA Petition because modifying the secondary status of LPTVs and translators at this stage would fundamentally undermine the Commission's Table of DTV Allotments ("DTV Table").^{2/} The DTV Table, and the ability of full power licensees to

^{1/} Amendment to Petition for Rulemaking, RM-9260, ¶ 1 (Mar. 18, 1998) ("Amended Petition"). The proposed rule appended to the Amended Petition proposes slightly different criteria for the stations with respect to which a Class A licensee would have primary status. These criteria are discussed more fully in Section I below.

^{2/} Although MSTV opposes the initiation of any rulemaking to consider granting primary status to LPTVs or translators during the DTV transition, we note also that if the Commission decides to
(continued...)

implement DTV by FCC and Congressional deadlines, is premised on the secondary status of low power services. Changing that premise now, particularly when there are so many DTV implementation challenges, could create chaos in many markets. Such a change would also reduce the critical flexibility that the Commission built into the DTV Table to facilitate the DTV transition and maximize its benefits.

Such disruption is simply not warranted. The Commission made clear the secondary status of LPTVs and translators when it created those services, and it has continually and unwaveringly reaffirmed that status. In the transition to digital, the Commission has also repeatedly concluded that the public interest in retaining the secondary status of LPTVs outweighs the displacement of LPTVs and translators. The Commission would put an end to counterproductive uncertainty for all concerned by making clear that it will not reopen this issue until the DTV transition, including the complicated task of spectrum repacking, is complete. At that time, there may or may not be sufficient spectrum to reexamine CBA's proposal.

**I. AWARDING PRIMARY STATUS TO LPTVs AND TRANSLATORS NOW
WOULD FUNDAMENTALLY UNDERMINE THE COMMISSION'S GOAL OF
ENSURING RAPID AND COMPLETE TRANSITION TO DTV SERVICE
THAT REPLICATES EXISTING ANALOG SERVICE.**

Through lengthy proceedings addressing the implementation of DTV, the Commission has made critical technical and policy determinations that establish the

^{2/}(...continued)

initiate a rulemaking, there are serious defects in the proposed rule that the Commission should address and rectify before doing so. Some examples of these defects are addressed in Section I below.

framework for the transition to DTV.^{3/} Central to this process was the development of the DTV Table, based on the principles of full accommodation of existing full service television stations, replication and maximization (to the extent possible) of existing broadcast service areas, and efficient management of scarce broadcast spectrum.^{4/} The Commission identified the full accommodation of existing full service broadcasters as its "primary allotment objective" because "[t]his approach will promote an orderly transition to the new service by ensuring that all eligible full service broadcasters are able to provide digital service."^{5/} The Commission concluded that DTV channel allotments should replicate existing broadcast service areas as closely as possible because "this approach would foster the transition to DTV, while simultaneously preserving viewers' access to off-the-air TV service and the ability of stations to reach the audiences they now serve."^{6/}

In accordance with these central principles, the Commission devised (and refined several times) the DTV Table, which (1) provides a channel for all eligible full service broadcasters; (2) attempts to the fullest extent possible to provide each broadcaster with a DTV channel that will allow it to replicate the service area of its existing NTSC service; (3) attempts "to minimize all unavoidable interference to both existing analog TV and

^{3/} Memorandum Opinion and Order on Reconsideration of the Sixth Report & Order, MM Docket No. 87-268, FCC 98-24, ¶ 1 (adopted Feb. 17, 1998, released Feb. 23, 1998) ("MO&O on Reconsideration of Sixth R&O").

^{4/} Sixth Report and Order, MM Docket No. 87-268, FCC 97-115, 12 FCC Rcd 14588, ¶ 3 (adopted April 3, 1998, released April 21, 1997) ("Sixth R&O").

^{5/} Id. ¶ 11. Although it acknowledged the benefits that low power stations provide to the public, the Commission expressly rejected the suggestion that it provide allotments for fewer than all full service licensees in order to avoid displacement of low power TV stations. Id.

^{6/} Id. ¶ 14.

new DTV service"; and (4) provides for the future recovery of a portion of the spectrum now used by television broadcasting.^{7/} In a broadcast environment characterized by scarcity of available spectrum,^{8/} creating a DTV Table that accomplishes these goals has been extremely difficult. The Commission has had to balance numerous competing interests (e.g., public safety, UHF stations, LPTVs, out-of-core stations), while doubling the number of TV stations in the same amount of spectrum.^{9/} Some of these tradeoffs--between interference and coverage, height and power--inevitably will have to be rebalanced as the DTV transition proceeds. Recognizing the fluidity of the DTV implementation process, the Commission has provided for needed flexibility in the rules.^{10/}

Against this backdrop, the CBA Petition seeks the creation of a class of LPTVs that would have primary status as against all but those full power stations with facilities that are "authorized" as of the date of filing of a "qualified" LPTV station's Class A license application or are "authorized in conformance with section 73.622(f)."^{11/} It is unclear

^{7/} MO&O on Reconsideration of Sixth R&O ¶¶ 4-5.

^{8/} See Sixth Further Notice of Proposed Rulemaking, MM Docket No. 87-268, FCC 96-317, 11 FCC Rcd 10968, ¶ 64 (adopted July 25, 1996, released Aug. 14, 1996) ("Sixth Further Notice") (noting that preliminary studies indicated that "it [would] be a challenge just to provide all full service licensees with an additional 6 MHz for DTV").

^{9/} See MO&O on Reconsideration of Sixth R&O ¶ 12 ("[T]he DTV allotments are the product of a balancing among many different interests and goals, such as the recovery of channels 60-69, protection of land mobile service, replication of NTSC service, minimization of interference, etc.").

^{10/} See, e.g., MO&O on Reconsideration of Sixth R&O ¶ 80 (adopting standard permitting changes in DTV operations and facilities as long as any additional interference is *de minimis*); 47 C.F.R. § 73.622(f)(3) (permitting DTV stations to exceed power and antenna height specifications in DTV Table and affected stations to agree to accept potential new interference).

^{11/} Amended Petition, App. A, at 2 (proposing 47 C.F.R. § 73.627(f)). There does not appear to be a temporal limitation on the primacy of "stations authorized in conformance with section

precisely what is meant by "authorized," but the proposed rule appears to contemplate that a Class A licensee would have priority over all DTV stations that have not filed and received approval for a construction permit as of the date of filing the Class A application,^{12/} or that are not subsequently "authorized in conformance with section 73.622(f)." Although the latter clause attempts to incorporate some of the flexibility the Commission has afforded full power DTV stations to adjust height and power, other provisions of the proposed rule apparently would permit Class A licensees to obtain DTV licenses and supplant or cause interference to full power DTV stations "authorized" after the Class A licensee applies for its DTV channel.^{13/} Thus, the proposed rule as a whole seriously threatens both the stability and flexibility of the carefully-crafted DTV Table.

First, obtaining a Class A license would be relatively simple compared to obtaining a full power DTV construction permit. The DTV application process could entail complex engineering studies, multiple-market negotiations, local zoning clearances, FAA clearances and the like. The obvious benefits for an LPTV station of obtaining a Class A license make it likely that a significant number of LPTVs will apply for and receive a Class A license before many full power licensees are able to obtain their construction permits. Under

^{11/}(...continued)

73.622(f)." However, the CBA Petition itself states that Class A stations would have primary status "as against all but full power television stations authorized as of the date of this petition." Amended Petition ¶ 1 (emphasis added). Thus, the lack of a temporal limitation may be somewhat illusory, particularly in light of proposed section 73.622(i). See Amended Petition, App. A at 3, and discussion infra at p. 6.

^{12/} See Amended Petition, App. A at 2 ("A Class A television licensee shall be protected from interference within its principal city grade contour, except from stations . . . with facilities that were authorized on or prior to the date of filing of the Class A application . . .") (emphasis added).

^{13/} See Amended Petition, App. A at 3 (proposing 47 C.F.R. § 73.622(i)).

CBA's proposed rule, those new Class A licensees would assume priority over DTV stations that have not yet obtained construction permits -- unless the DTV stations are subsequently "authorized in conformance with section 73.622(f)" -- and could prevent some of those not-yet-"authorized" DTV stations from ever lighting up.^{14/} Perhaps more significantly, the proposed rule appears to afford Class A licensees easy access to DTV channels, and to permit a Class A DTV station to interfere with full power DTV stations "authorized" after the Class A licensee applies for its DTV channel. Proposed section 73.622(i) would permit a Class A licensee to obtain a DTV allotment by either (1) applying for an additional DTV channel, regardless of the DTV Table, as long as the new Class A DTV station would not interfere (unless interference is accepted) with other stations authorized prior to the date of application; (2) applying to convert from NTSC to DTV on its existing channel, as long as the DTV station would create no new interference to any station "authorized" as of the date of the conversion application; or (3) applying for a channel listed in the DTV Table if the licensee to whom the channel has been allotted has not filed an application for a construction permit by the deadline prescribed in section 73.624(e).^{15/} If low power DTV stations were permitted to supplant or interfere with full power DTV stations, the crucial goals of fully accommodating all NTSC licensees and of replicating wide-area NTSC coverage in the digital

^{14/} For example, a full power DTV station that seeks and is granted a waiver of the power and antenna height requirements in section 73.622(f) apparently would not have priority over a Class A licensee unless the DTV station was "authorized" prior to the Class A licensee's filing of its application. A Class A licensee with primary status could prevent such a station from ever going on air. The Commission should not be precluded from assessing requests to waive section 73.622(f) in certain instances, as it would if a Class A licensee could exercise its priority to prevent a DTV station from operating under such a waiver.

^{15/} See Amended Petition, App. A at 3 (proposing 47 C.F.R. § 73.622(i)).

arena would be severely undermined.^{16/} Thus, by granting priority directly and by enabling Class A licensees to interfere with or displace full power DTV stations, the proposed rule could leave DTV allotments under- or unoccupied and communities under-served, fundamentally undermining the DTV broadcast structure contemplated by Congress and the Commission.

Second, full service broadcasters likely would, as a practical matter, feel compelled to "race" for priority against Class A license applicants because they would not want to risk losing priority if they were unable to conform to section 73.622(f). A full power DTV station might also "race" to apply for a construction permit because under proposed section 73.622(i), the DTV station could be subject to interference from a Class A DTV station if the Class A licensee applies for its DTV channel before the full power station is "authorized." Alternatively, the full power DTV station could lose its DTV allotment entirely to a Class A licensee if the station does not file an application for a construction permit by the deadline specified in section 73.624(e).^{17/} In such an environment, full power DTV stations would lose, to the detriment of the public, the flexibility properly provided to them

^{16/} In addition to disrupting the DTV Table and DTV transition, the generous grant of DTV stations to LPTVs would be unfair. As discussed more fully below in Section II, LPTVs, precisely because of their low power status, have continued to be licensed during the DTV transition while many full power NTSC applicants have been frozen out. For "qualified" LPTVs now to gain access to DTV channels would be unfair to those NTSC applicants that have been excluded from DTV channel allocation as well as NTSC licensing.

^{17/} See Amended Petition, App. A. at 3 (proposing 47 C.F.R. § 73.622(i)). There are numerous reasons why a full power licensee allotted a digital channel might seek and be granted an extension for filing its application for a construction permit. Under CBA's proposed rule, however, there would be no exception to a Class A licensee's right to apply for the channel once the deadline for the full power licensee to apply for a construction permit has passed. Thus, the rule could create a situation in which a full power licensee loses its allotment even though the Commission has accepted the licensee's reasons for missing the permit application deadline and granted an extension.

by the DTV Table. For example, a full power DTV broadcaster racing for priority against a Class A license applicant or hastening to file its construction permit application by its section 73.624(e) deadline or before a Class A licensee could apply for a potentially interfering DTV channel could not take the time to negotiate with other DTV broadcasters for a joint tower or to switch allotments,^{18/} even though such an arrangement might increase the public benefits of digital broadcasting.

II. LPTVs AND TRANSLATORS HAVE ALWAYS BEEN SECONDARY TO FULL POWER STATIONS, THAT STATUS HAS BEEN RECONSIDERED AND REAFFIRMED NUMEROUS TIMES IN THE DTV PROCEEDING, AND NOTHING IN THE CBA PETITION JUSTIFIES REVISITING THOSE DECISIONS AT THIS TIME.

Since their inception, low power TV stations have received protection that is secondary to that afforded full power stations.^{19/} As the Commission noted in the rulemaking proceeding that established the LPTV service, it is a "fundamental principle" that "low power television stations, like television translators, should enjoy only a secondary status."^{20/} In that proceeding, the Commission determined that the public interest was best

^{18/} See 47 C.F.R. §§ 73.622(c), 73.623 (authorizing exchange of DTV channel allotments between two or more licensees in the same community and specifying requirements for petitions to amend DTV Table).

^{19/} See, e.g., Low Power Television and Television Translator Service (Notice of Proposed Rulemaking), MM Docket No. 86-286, 1986 FCC LEXIS 3075, ¶ 18 (1986) ("Television translators have always been considered secondary to full service television stations in spectrum priority. This secondary status was continued when the low power television service was instituted.").

^{20/} Future Role of Low Power Television Broadcasting and Television Translators (Notice of Proposed Rule Making), BC Docket No. 78-253, 82 F.C.C.2d 47, 54-55 (1980); see also Future Role of Low Power Television Broadcasting and Television Translators (Report and Order), BC Docket No. 78-253, 51 Rad. Reg. 2d (P & F) 476, 486 (1982) ("LPTV R&O") ("First and foremost, we intend to maintain the secondary spectrum priority of low power stations, a policy that ensures protection from interference to full service stations."); *id.* at n.23 ("as it is integral to the concept of a secondary service that it yield to mutually exclusive primary service, we shall not take low power stations into account in authorizing full service stations.").

served by affirming the priority of full service stations, and noted that "the coverage obligations to which we subject full service stations specifically are designed to ensure maximum service to the public, beyond what we shall require of low power."^{21/}

The Commission has repeatedly reaffirmed, and relied upon, the secondary status of low power services throughout the DTV proceeding. In 1987, the Commission initiated the DTV proceeding and ordered a freeze on new analog TV allotments in areas with a high density of existing TV stations in order "to preserve sufficient broadcast spectrum to insure reasonable options relating to spectrum issues for . . . new technologies."^{22/} In doing so, the Commission recognized that the secondary status of LPTVs and translators meant that they would not complicate future spectrum allocation issues: "This freeze will not apply to low power television (LPTV) and television translator applications. . . . These constitute a secondary service and pursuant to present rules are subject to displacement by a primary service. Therefore, LPTV and TV translator grants will not restrict Commission options."^{23/} Consistent with its initial determination that LPTVs and translators would not interfere with the allocation of broadcast spectrum to DTV channels, the Commission, in the Second Report and Order/Further Notice of Proposed Rulemaking, determined that because of the limited

^{21/} LPTV R&O at 488.

^{22/} Advanced Television Systems and Their Impact on the Existing Television Broadcast Service, RM-5811, 1987 FCC LEXIS 3477, ¶ 2 (adopted July 16, 1987, released July 17, 1987), 52 Fed. Reg. 28346 (1987).

^{23/} Id. ¶ 3 n.4. As a result of this differential treatment, LPTVs have continued to be licensed during the DTV transition, while many full power NTSC applicants (including many petitioners seeking reconsideration in the DTV proceeding) have been frozen out. It would be unfair at this point to give some of those LPTVs priority -- and DTV channels -- while continuing to exclude the full-power NTSC applicants.

broadcast spectrum available, it would be necessary to continue LPTVs' and translators' secondary status vis-a-vis DTV stations, and as a result some LPTVs and translators would have to be displaced to provide DTV allotments to existing full service stations.^{24/} That decision withstood judicial challenge.^{25/} The Commission later reiterated its earlier conclusion,^{26/} explaining that although it "recognize[d] the benefits that low power stations provide to the public," it found that "on balance the benefits and innovations to be derived from [the implementation of DTV service and subsequent spectrum recovery] outweigh" the impact on LPTVs and translators of displacement by new DTV stations.^{27/} The Commission again reaffirmed the secondary status of LPTVs and translators in the Sixth R&O.^{28/}

As explained above, the Commission's conclusion that the secondary status of LPTVs and translators must be maintained during the DTV transition remains sound, and nothing in the CBA Petition justifies revisiting that conclusion at this time. That the proposed rule is geared specifically toward low power stations that provide "substantial local programming service" does not justify further reconsideration of the issue. The Commission took full account of the local programming benefits provided by LPTVs when it sustained their secondary status in the DTV proceeding.^{29/}

^{24/} Second Report and Order/Further Notice of Proposed Rulemaking, MM Docket No. 87-268, 7 FCC Rcd 3340, ¶¶ 39-41 (1992).

^{25/} See Polar Broadcasting, Inc. v. FCC, No. 92-1597 (D.C. Cir. March 24, 1994).

^{26/} Sixth Further Notice ¶ 64.

^{27/} Id. ¶ 66.

^{28/} Sixth R&O ¶¶ 11, 142.

^{29/} See, e.g., MO&O on Reconsideration of Sixth R&O ¶ 105; Sixth R&O ¶ 114; Sixth Further Notice ¶ 67.

Precisely because of its concern about the potential displacement of LPTV programming, the Commission has taken special steps to accommodate LPTVs in the DTV transition. For example, in the Sixth R&O the Commission adopted rule changes that, inter alia, permit displaced LPTVs to apply for replacement channels through a streamlined application process and without being subject to competing applications and ease the interference rules to permit low power stations greater operating flexibility.^{30/} In the MO&O on Reconsideration of the Sixth R&O, the Commission further expanded the opportunities for LPTVs and translators to seek displacement relief and provided that DTV stations that are co-located with a lower adjacent channel low power NTSC station must cooperate and maintain the necessary offset to eliminate interference to the low power station.^{31/} Thus, the Commission has taken every reasonable measure to protect LPTVs and translators while ensuring the integrity of the DTV Table and promoting the overriding goal of a swift and effective transition to DTV, and should take no additional measures akin to that proposed in the CBA Petition at least until after the DTV transition is complete.^{32/}

^{30/} Sixth R&O ¶¶ 144-147.

^{31/} MO&O on Reconsideration of Sixth R&O ¶¶ 115, 120.

^{32/} It remains an option for the Commission to reconsider the secondary status of LPTVs and translator stations after the transition to DTV is complete. (In that regard, in the Sixth R&O, the Commission stated that it "recognize[d] that most low power stations can continue to operate throughout the DTV transition. We intend to consider in a future rule making whether to create a new class of low power television broadcast stations that would modify the secondary status of these stations and provide them some level of interference protection." Sixth R&O ¶ 143. We are not entirely sure what time frame the Commission has in mind for this "future" rulemaking, but the immediately preceding statement that the Commission expects most LPTVs and translators to survive the transition to digital suggests that the Commission does not intend to conduct a future rulemaking on the issue of the priority of low power stations until the transition to DTV is complete. This would be consistent with the Commission's prior statements on the importance of maintaining the secondary status of LPTVs and translators with respect to new DTV stations, and itself demonstrates that CBA's
(continued...)

* * *

For the reasons stated above, the Commission should deny the CBA Petition.

Respectfully submitted,

ASSOCIATION FOR MAXIMUM
SERVICE TELEVISION, INC.

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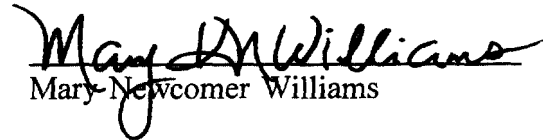
^{32/}(...continued)

Petition for Rulemaking is premature.) Indeed, greater protection for low power stations could be one of the benefits of the increased efficiency in utilization of the broadcast spectrum that will result from the transition to digital broadcasting. However, to attempt to take advantage of that benefit before the transition even occurs would seriously undermine the very effort to bring the transition about.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of the Association for Maximum Service Television, Inc. has been served by first class mail, postage prepaid, this 22nd day of May, 1998 on:

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